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TEXAS AND PACIFIC RAILWAY CO. *v.* SCOVILLE.[1] CIRCUIT COURT OF APPEAL, FIFTH CIRCUIT. MAY 22, 1894.

The wanton and malicious use of the steam whistle of a locomotive by servants of a railroad company who are in charge of the locomotive, while it is in motion on a regular or authorized run, is an act within the scope of their employment so far as to charge the company with liability for injuries caused thereby. LOCKE, District Judge, dissenting.

The plaintiff, while riding on horseback along a public road running parallel with the railway of the defendant company, received serious personal injuries as a result of the fright of his horse, which was caused by the malicious blowing of a whistle by one of the defendant's servants in charge of a locomotive on the railway. The defendant sought to defend the action on the ground that a master is not responsible for a wanton, wilful, and malicious act, not done on the master's account or to further his interest, but committed exclusively for the servant's private ends, or maliciously. *Held*, that the company was chargeable with the results of the servant's act.

MCCORMICK, Circuit Judge:—We are in danger of refining too much when we attempt to distinguish between a negligent and a wanton or malicious use of the steam whistle of a locomotive engine in charge of the proper servants of the company while engaged in pulling its regular trains, moving at schedule rate or schedule time, under direct, constant, telegraphic orders. If it is contended that, in this act, the servants were not in the master's service, because not employed to blow the whistle

[1] Reported in 62 Fed. Rep. 730.

wantonly and maliciously to frighten travelers or their horses, that contention is fully answered by the Supreme Court of Illinois,—that these servants are not employed to do any negligent or unlawful act, and such a test would exempt the company from liability from all affirmative acts of these servants violating the rights of others: *Railway Co.* v. *Harmon*, 47 Ill. 298; *Railroad Co.* v. *Dickson*, 63 Ill. 151. It is conceded that, in case of passengers receiving injury from the action of the servants of the railroad company, no distinction between negligent and wanton and malicious conduct obtains. It is contended that, in such cases, the corporation is held because of its contract to carry safely. That is one reason, and a cogent one, for holding the company in such cases; but it is only one of the grounds for so holding. If public policy and safety require that carriers who undertake to convey persons by the powerful, but dangerous, agency of steam, shall be held to the greatest possible care and diligence, and, whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of carriers' agents, or their wanton malice, the same public policy and safety demand that these all-pervading corporations, who commit to the custody and use of their servants, in such great numbers, these terrible expressions of the powerful and dangerous agency of steam, shall maintain discipline in their ranks, and by the utmost care and diligence protect the public, not only from its negligent use, but from its wanton or malicious use, by these servants, to the hurt of any one in the lawful enjoyment of the state's peace. To say that the engineer and fireman who have charge of the locomotive on a regular run may, while so running it, so blow the whistle, wantonly and maliciously, that by their manner of blowing it and motive for blowing it, in the indulgence of their love of mischief or other evil motive, they separate themselves, in and by that act and for that instant, from the company's service, is to refine beyond the line of safety and sound reason. Public policy and public safety require that the use of the steam whistle by those servants who are in charge of the locomotive,

and while the locomotive is in motion on its regular or authorized runs, should be held to be done within the scope of the employment of these servants, so far as to charge the company with liability therefor.

LIABILITY OF A MASTER FOR PERSONAL INJURIES TO THIRD PARTIES CAUSED BY THE WILFUL OR MALICIOUS ACTS OF HIS SERVANTS.

That a master is liable in damages to a third person who receives an injury from an act of a servant, which is authorized by the master, or fairly implied from the nature of the servant's employment, and the duties which are annexed, and incident to it, is a proposition of law which is well established and universally followed. The difficulty which has given rise to the great number of cases in all jurisdictions, has been in applying the proposition to the actual facts. Every class of employment and service presents a new set of conditions, and while it may be true that the master is liable to a third party for an injury caused by an act of the servant, committed by him while acting within the scope, and during the course of the employment, yet the very terms being variables, the line of demarcation is often hard to draw. The acts of servants which result in injuries to third persons, are divisible into two general classes, acts of omission, and acts of commission. As to the former, it has been long the rule that the master is liable for injuries caused thereby, and the question in each case simply reduces itself to a consideration whether the act was in reality within or without the scope of the particular employment. Originally the courts held, that for wilful acts, or acts of commission, the rule was different, and assigned as a reason for this, that by the very act of wilfulness, the servant, *ipso facto*, left the employment and became an independent *tort feasor*. The case usually cited to substantiate this argument is *McManus* v. *Cricket*, 1 East. 106. This was an action of trespass, in which the declaration charged that the defendant, with force and arms, drove a certain chariot against a chaise, in which the plaintiff was riding, by which the plaintiff was thrown out and injured. It appeared that the servant

of the defendant wilfully drove the chariot into the plaintiff, but that the defendant himself was not present, nor did he in any way, either expressly or impliedly, authorize or assent to the act, and on these facts, Lord Kenyon said: "It is a question of very general concern, and has been often canvassed, but I hope at last it will be at rest. . . . Now, when a servant quits sight of the object for which he is employed, and without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and his master will not be answerable for such act." The controlling element in the case is the absence of any authority, either express or implied, on the part of the servant, to do the act complained of; and while it is suggested by Lord Kenyon, that the act of the servant being a trespass, the master could not be held liable under such circumstances, nevertheless, the case merely decided that the master is not liable for a wilful wrong committed by his servant where there is a total absence of authority in the servant to do the act.

The early cases, both in England and America, which maintain or suggest the distinction of liability between negligent and wilful acts, are collected in *Wright* v. *Wilcox*, 19 Wend. 342. This was an action brought for an injury sustained by the son of the plaintiff in being run over by a wagon driven by S. Wilcox, the son of J. Wilcox, while in the employment of the father. The plaintiff's son was on his way to school, and asked S. Wilcox to permit him to ride, who answered that he might do so when he got up a hill which he was then ascending. When the hill was ascended, the lad took hold of the side of the wagon between the front and hind wheels. S. Wilcox did not stop his team, although cautioned by a bystander to do so, but looking back and seeing the plaintiff's son attempting to get on the wagon, he cracked his whip and put the horses upon a trot. The plaintiff's son fell, and the wheel passed over him. The plaintiff recovered in the court below, but on a motion for a new trial, Cowen J., reversing the decision, said: ". . . It is different with a wilful act of mischief. To subject the master in such

a case, it must be proved that he actually assented, for the law will not imply assent. . . . The law holds such a wilful act a departure from the master's business."

In *Puryear* v. *Thompson*, 5 Hump. (Tenn.), 396, the court carried the distinction between wilful and negligent acts to an extreme position. The plaintiff sought to recover the value of a negro boy who was killed by the overseer of the defendant while inflicting punishment for an offence. Puryear had instructed the overseer to "give the negro a good whipping—be sure and humble him before you let him down." The overseer whipped the negro severely, and as a result of the chastisement the latter died. The court held that if the overseer, in pursuance of the defendant's directions, intended only to chastise the negro until he should be humbled, and in the attainment of that object, so negligently and recklessly inflicted blows as to take the life of the negro, the defendant would be liable. But if he abandoned the purpose to chastise until the negro should be humbled, and employed instruments of torture to justify his malice, intending to kill the negro, in such case the defendant would not be liable.

Such an argument, however, is fallacious, and illustrates the fact that the confusion which has arisen with regard to wilful acts of servants, is due to a misapprehension. It may be true that, from the standpoint of the wrong-doer, the servant, the act was wilfully done, but from the standpoint of the master, the result is still an accident—one which the master may be liable for, because had he not employed the servant to achieve the result contemplated, the servant would not have desired to have accomplished the end, in the furtherance of which a wilful tort has been committed. "If the act is properly chargeable to the master, that is, if it can be fairly said to be his act and not the act of the servant, the motives, purpose or intention of the servant, cannot operate to shield the master from the consequences. If it was an act done in doing that which the master employed the servant to do, although done contrary to the master's will, against his instructions and without his knowledge, although unnecessary to accomplish the work, ill-advised, malicious, or wanton, he is liable, because

he has set in motion the agency which produces the wrong:" *Wood, Master and Servant*, § 303.

The case of *Wright* v. *Wilcox*, *supra*, has been generally discarded: *Weed* v. *Panama R. R.*, 17 N. Y. 362; *Mali* v. *Lord*, 39 N. Y. 384; *Isaacs* v. *R. R.*, 47 N. Y. 122; *Rounds* v. *R. R.*, 64 N. Y. 129, and cases subsequently cited.

In *Croft* v. *Alison*, 4 B. & A. 590, the court of King's Bench say that "the distinction is this; If a servant, driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person and produce an accident, the master will not be liable. But, if, in order to perform his master's orders, he strikes, but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the servant's employment." The case showed that the defendant's servant had wilfully struck the plaintiff's horses, when driving his master's carriage, in order to extricate himself from an entanglement of the carriage caused by his own fault, and thereby had caused an injury to the plaintiff; and a verdict for the plaintiff was supported. In *Seymour* v. *Greenwood*, 6 H. & N. 359, Chief Baron Pollock asks the question: "Suppose a servant, driving along a road in order to avoid a danger, intentionally drove into the carriage of another, would not the master be liable?" and, in *Limpus* v. *London General Omnibus Co.*, 1 H. & C. 526, it was decided in the Exchequer Chamber that the master is responsible if the servant is in the course of doing the master's work, and does the act to accomplish it.

In *Howe* v. *New March*, 12 Allen 49, Hoar, J., states the true rule of liability to be this: "The master is not responsible as a trespasser, unless by direct or implied authority to the servant he consents to the wrongful act. But, if the master gives an order to a servant which implies the use of force and violence to others, leaving to the direction of the servant to decide when the occasion arises to which the order applies, and the extent and kind of force to be used, he is liable if the servant in executing the order makes use of force in a manner or to a degree, which is unjustifiable. . . . If the

act be done in the execution of the authority given him by the master and for the purpose of performing what the master has directed, the master will be responsible whether the wrong done be occasioned by negligence or by a reckless or wanton purpose to accomplish the master's business in an unlawful manner." Cf., also, *Ramsden* v. *R. R. Co.*, 104 Mass. 117; *Wallace* v. *Express Co.*, 134 Mass. 95.

In *Eckert* v. *St. Louis Transfer Co.*, 2 Mo. App. 36, Bakewell, J., said: "The question, in cases of this kind, is not whether the act of the servant is wilful or negligent. . . . The inquiry is, whether the act was done in the course of the servant's employment. The argument that when the servant acts wilfully he, *ipso facto*, leaves the employment of the master for the minute or so that this passion rages, is rightly characterized as a specious fallacy. . . . The master, in case of negligence or wilfulness, is liable, not so much for having impliedly authorized the act, as for having employed a faithless servant who did the injury in the course of his employment. Cf., also, *Priester* v. *Augley*, 5 Rich. L. (S. C.) 44; *Railroad* v. *Derby*, 14 How. (U. S.) 468.

It is in accordance with the proposition as laid down in this case that the majority of the cases have been decided; and it may be safely said that, while a different opinion does, to some slight degree, exist, yet the tendency certainly is to blend all the acts of servants which result in injuries to third persons under one head. Cf. *Fick* v. *Chicago, etc., R. R.*. 68 Wis. 469; *Mott* v. *Ice Co.*, 73 N. Y. 543; *Rounds* v. *R. R.*, 64 N. Y. 129; *Marion* v. *R. R. Co.*, 59 Iowa, 429; *Great Western Ry.* v. *Miller*, 19 Mich. 305; *Dickson* v. *Waldron*, 35 N. E. 1.

The question whether a wilful act is or is not within the scope of the servant's employment is, obviously, one which must depend upon the facts of each separate case which arises. As, however, the decision in the leading case suggests a consideration of the subject, it might be advantageous to group the cases in a more or less systematic manner, giving the facts of the more important cases, and referring to those consistent or inconsistent with them. It will be seen that the authorities are irreconcilible.

Acts of Servants Employed on Steam Railroads.

Acts of Agents.

In *Fick* v. *Chicago R. R.*, 68 Wis. 469, a ticket agent left another employé in charge of the ticket office of the defendant company, who failed to return to the plaintiff the proper change upon the sale of a ticket; and after being asked therefor by the purchaser, assaulted and struck the latter. The company was held liable in damages. Cf., also, *McKearnan* v. *R. R.*, 22 J. & S. (N. Y.) 354; *Christian* v. *Columbus & Rome R. R.*, 59 Ga. 460.

In *Mulligan* v. *New York, etc., R. R.*, 29 N. E. 952, the defendant's ticket agent, acting under a notice given him by police officials to look out for a counterfeit $5 bill, and describing three men as passing the same, supposing a bill presented by the plaintiff to be a counterfeit, and the plaintiff, one of the persons described, ordered his arrest after accepting the bill in payment for a ticket. It was held that the company could not be held liable for the arrest, which proved to be false, since, if, in fact, the servant was acting within the scope of his duty, he would have refused the money for the property of his principal and would have refused to part with such property except upon receipt of what, at least, he believed to be good money.

Acts of Baggagemen.

In *Little Miami R. R.* v. *Wetmore*, 19 Ohio, 100, it appeared that the plaintiff after purchasing a ticket as a passenger, applied to the servant of the defendant company, charged with the duty of checking baggage, to have baggage checked, and by his abusive language towards the servant, provoked a quarrel, in which the servant, to gratify his personal resentment, struck the plaintiff with a hatchet. It was decided that the act was outside of the servants' employment.

In *Rounds* v. *R. R.*, 64 N. Y. 129, the plaintiff, having gotten upon the platform of a baggage car of the defendants' road, was ordered to get off, as the rules of the company forbade all persons, except certain employés, to ride on the baggage cars. The plaintiff, hesitating to jump off while the car

was in motion, was kicked off by the servant in charge, and fell under the cars. The company was held liable. Cf., however, *Louisville, etc., R. R.*, v. *Douglass*, 11 So. 933.

Acts of Brakemen.

In *Moody* v. *Texas, etc., R. R. Co.*, 23 S. W. 41, it was held, that the defendant company was not liable for the wilful act of a brakeman in kicking a trespasser from its moving train, whereby the trespasser was killed. Cf., also, *Alabama R. R.* v. *Harris*, 14 So. 263; *Towanda Coal Co.* v. *Herman*, 86 Pa. 418; *Faber* v. *Missouri, etc., R. R.*, 32 Mo. App. 378; *Marion* v. *R. R. Co.*, 59 Iowa, 429; *R. R. Co.* v. *Hendricks*, 48 Ark. 177; and Cf., *Texas R. R.* v. *Mather*, 24 S. W. 79; *Cain* v. *Minn. R. R.*, 39 Minn. 297. The plaintiff, a boy of 13, either attempted to board, or succeeded in boarding, a train moving over the defendant's railway. It appeared he had hold of the car-rail, with one foot on the step, and the other just leaving the ground, when the brakeman kicked him in the chest, breaking his hold upon the rail, whereby he fell, and the car passed over his leg. The company was held liable; *Molloy* v. *N. Y. Central, etc., R. R.*, 10 Daly, 453; *Heffel* v. *St. Paul R. R.*, 49 Minn. 263; *Kelly* v. *Kansas City R. R.*, 36 Kan. 655; *Smith* v. *R. R. Co.*, 23 S. W. 652; *Lucas* v. *R. R.*, 56 N. W. 1039; *Lang* v. *R. R.*, 4 N. Y. S. 565.

Acts of Conductors.

In *Ramsden* v. *Boston, etc., R. R.*, 104 Mass. 117, the plaintiff, a female, got into the defendant's cars, and paid the fare to the conductor, who later attempted to again collect the same, and upon a refusal to pay, committed an assault upon the plaintiff. The plaintiff recovered. Cf., also, *Paddock* v. *R. R.*, 37 Fed. 841; *Coleman* v. *R. R.*, 106 Mass. 1871; *R. R. Co.* v. *Anthony*, 43 Ind. 183; *Higgins* v. *Watervliet Turnpike Co.*, 46 N. Y. 23: *Wabash R. R.* v. *Rector*, 104 Ill. 296; *Jeffersonville R. R.* v. *Rogers*, 38 Ind. 116; *Baltimore & Ohio R. R.* v. *Blocket*, 27 Md. 277; *Hagen* v. *R. R. Co.*, 3 R. I. 88; *Moore* v. *R. R.*, 4 Gray, 465; *Winnegar's Adm.* v. *R. R.*, 85 Ky. 547; *Chicago R. R.* v. *Flexman*, 103 Ill. 546; *Pennsylvania R. R.* v. *Vandiver*, 42 Pa. 365; *Smith* v. *R. R.*, 24 N. E. 753.

The plaintiff got upon a freight car, and after it had started the conductor told him to get off. The plaintiff then offered to pay fare, but the conductor declined to take it, and gave the plaintiff a push, so that he had to jump to save himself and thereby incurred injuries. It appeared that the company had instructed its conductors that they should not allow any person to ride on any freight car. The court held the defendant company liable: *Holmes* v. *Wakefield*, 12 Allen, 580.

A conductor on the defendant's road finding that the car had been robbed, and suspecting the plaintiff's son to have committed the crime, walked up to him and killed him. It was held that the act was beyond the servant's employment, and that he alone was responsible in damages: *Cardiff* v. *R. R.*, 7 So. 601.

Acts of Engineers.

A railroad company was held liable in *Chicago R. R.* v. *Dickson*, 63 Ill. 151, for maliciously blowing a whistle whereby the horse of the plaintiff became unmanageable and the plaintiff was injured: Cf., also, *R. R. Co.* v. *Starrns*, 9 Heisk. 52. And in *R. R. Co.* v. *Harmon*, 47 Ill. 298, for maliciously allowing steam to escape, and thereby frightening the plaintiff's team of horses to his personal damage. For wilfully backing an engine towards a street car, whereby the plaintiff thinking a collision imminent, jumped out and was injured, the court held, in *Stephenson* v. *Southern Pacific R. R.*, 93 Cal. 558, that the plaintiff could not properly charge the company. Cf., also, in general: *Gulf, C. & S. C. R. Co.* v. *Kirkbride*, 15 S. W. 495; *Mars* v. *Canal Co.*, 8 N. Y. S. 107; *Fitzsimmons* v. *R. R.*, 57 N. W. 127; *Carter* v. *Louisville R. R.*, 98 Ind. 552.

Acts of Firemen.

In *Chicago, Burlington and Quincy R. R.* v. *Epperson*, 26 E. B. Smith (Ill. App.), 72, a fireman on the defendant's road, from mere wantonness, placed torpedoes under the cars and caused an injury to the plaintiff. The court held that the act was outside of the scope of the fireman's employment, and the company was not liable for his act: Cf., in general, *Flower* v. *Pennsylvania R. R.*, 49 Pa. 210.

Acts of Porters.

For assault of passenger by porter the company was held liable in *Dwinelle* v. *N. Y. C. & H. R. R. Co.*, 24 N. E. 319; Cf., also, *Williams* v. *Pullman Car Co.*, 33 American & English R. R. Cases, 414. For ejecting a passenger from a moving train, whereby the former was killed, the company was held liable in *Harlinger* v. *N. Y. C., etc., R. R.*, 15 Weekly Digest (N. Y.), 392. Cf., also, *Thorp* v. *N. Y. C. R. R.*, 76 N. Y. 402.

Acts of Watchmen.

Company held liable for act of a bridge watchman, who shot a trespasser on the bridge he was guarding: *Haehl* v. *Wabash R. Co.*, 24 S. W. 737.

Acts of Other Servants of Railroad Company.

In *Hewitt* v. *Swift*, 3 Allen 420, the evidence showed that one F was a servant of the company having charge of the freight in the depot at Charleston, and the plaintiff, a small boy, was playing there, and refused to leave; F thereupon removed him forcibly, and, in doing so, kicked him severely. The company was held liable. A company was held liable, in *Terre Haute, etc., Co.* v. *Jackson*, 81 Ind. 19, for wilfully drenching the plaintiff with water. Cf. for other illustrations of wilful acts in this connection: *Harriman* v. *R. R. Co.*, 45 Ohio, 11; *Ill. Cent. R. R.* v. *Ross*, 31 Ill. App. 170; *Northwestern R. R. Co.* v. *Hack*, 66 Ill. 328; *Nevin* v. *Pullman Car Co.*, 106 Ill. 222; *Denver R. R. Co.* v. *Harris*, 122 U. S. 597; *Wabash R. R.* v. *Rector*, 104 Ill. 296.

STREET RAILWAY COMPANIES.

Acts of Conductors.

In an action against a street railroad company for ejecting a passenger with unnecessary force, while the car was in motion, the company was held liable: *Chicago, etc., R. R.* v. *Pelletier*, 24 N. E. 770; *Pine* v. *St. Paul, etc., R. R.*, 52 N. W. 392; *New York, etc., R. R.* v. *Haring*, 47 N. J. L. 137; *Sandford* v. *R. R.*, 23 N. Y. 343; *Murphy* v. *R. R.*, 118 Mass.

228; *McKeon* v. *R. R.*, 42 Mo. 80; *Putman* v. *R. R.*, 55 N.Y. 108; *Passenger R. R. Co.* v. *Young*, 21 Ohio, 518; *Harman* v. *R. R. Co.*, 52 N. W. 830; *Savanah, etc., R. R.* v. *Bryan*, 12 S. E. 307; *Macken* v. *People's R. R.*, 45 Mo. App. 82; *Shea* v. *6th Ave. R. R.*, 62 N. Y. 180; *Kline* v. *Central R. R.*, 37 Cal. 400; *Schultz* v. *R. R.*, 89 N. Y. 242; cf., however, *Isaacs* v. *3rd Ave. R. R.*, 47 N. Y. 122, where it appeared that the plaintiff, a passenger on the defendant's car, desiring to alight, passed out upon the platform and requested the conductor to stop the car and refused to get out until the car came to a full stop, whereupon the conductor threw her with force from the car, and she incurred injury. It was held that the act was not chargeable to the company. Cf., also, *Citizens R. R.* v. *Willoeby*, 33 N. E. 627; *Drew* v. *6th Ave. R. R.*, 26 N. Y. 49; *Hart* v. *R. R.*, 57 N. W. 91.

Acts of Drivers.

A passenger on a street car, to whom the driver had used profane language, replied that he would report the driver to the company at the office, which was at the stables of the company, where the car stopped for change of horses. Before reaching there the passenger got off the car, intending to go to the office, and the driver followed and assaulted him. It was held that the act of the driver was beyond the scope of his authority: *Central R. R.* v. *Peacock*, 69 Md. 259. Cf., also, *Chicago R. R.* v. *Mogk.*, 44 Ill. App. 17; *Ryan* v. *R. R. Co.*, 1 J. & S. (N. Y.) 137; *R. R. Co.* v. *Donahoe*, 70 Pa. 119. Cf., however, *Wilton* v. *Middlesex R. R.*, 107 Mass. 108; *Lovett* v. *Salem R. R.*, 9 Allen, 557; *Kline* v. *R. R.*, 37 Cal. 400; *Hogan* v. *Ry. Co.*, 124 N. Y. 647; *Hestonville R. R.* v. *Biddle*, 112 Pa. 551.

Where a driver wilfully had a passenger arrested the company was held liable: *Lafayette* v. *Rwy. Co.*, 8 So. 701, and cf. similarly: *Winneger's Admx.* v. *R. R.*, 85 Ky. 547.

So, also, the company employing a driver who purposely ran into a plaintiff while driving a carriage, has been held liable on the ground that the act was one within the line of employment: *Cohen* v. *Dry Dock R. R.*, 69 N. Y. 170.

STEAMBOAT COMPANIES, FERRIES, ETC.

Where a mate on a ship found a man who had taken deck passage, on some bales of moss, and, ordering him off, kicked and otherwise assaulted him, the company was held responsible for the act: *Springer Transportation Co.* v. *Smith* 16 Lea. (Tenn.) 498. Cf., also, *Hamel* v. *Ferry Co.*, 6 N. Y. S. 102; *Scanlon* v. *Suter*, 158 Pa. 275; *Coger* v. *Northwestern Packet Co.*, 37 Iowa 145; *Pendleton* v. *Kingsley*, 3 Cliff. (U. S.) 416; *Block* v. *Bannerman*, 10 La. An. 1.

Where it appeared that the plaintiff was a passenger on a steamboat, and was assaulted by a clerk whose duty it was to collect fares or passage money, and who claimed that the plaintiff had hidden to escape payment, and upon a denial assaulted the plaintiff and put his eye out, the company employing the servant was held liable: *Sherley* v. *Billings*, 8 Bush. 147. Cf., also, *Bryant* v. *Rich*, 106 Mass. 180.

VARIOUS OTHER INSTANCES.

In *Mott* v. *Ice Company*, 73 N. Y. 543, the plaintiff, while driving, was run into and injured by a wilful act of the driver of an ice cart belonging to the defendant. The lower court dismissed the complaint on the ground that the act which caused the injury was wilful, and therefore beyond the employment of the servant. This the Supreme Court reversed.

Where the servants of an inn-keeper assaulted and injured the plaintiff, who was living at the hotel, the owner was held liable: *Wade* v. *Thayer*, 40 Cal. 578. Cf., *Curtis* v. *Dinneer*, 30 N. W. 148.

Where a bartender of defendant's saloon injured the plaintiff by forcibly and wantonly ejecting him, while intoxicated, from the saloon, its proprietor was held liable in damages: *Brazil* v. *Peterson*, 46 N. W. 331. Cf., *Fortune* v. *Trainer*, 19 N. Y. S. 598.

For the wilful act of a servant in causing arrest of a customer, a storekeeper has been held liable: *Geraty* v. *Stern*, 30 Hun. 426: *Staple* v. *Schmid*, 26 At. 193; *Hershey* v. *O'Neill*, 36 Fed. 168. Cf., however, *Mali* v. *Lord*, 39 N. Y. 381; *Porter* v. *R. R. Co.*, 41 Iowa, 358; *Meehan* v. *Moreland*, 5 N. Y. S. 710.

For an example of an assault by a servant of a theatre proprietor, for which the latter was made to respond in damages: Cf., *Fowler* v. *Holmes*, 13 N. Y. S. 816; *Dickson* v. *Waldron*, 35 N. E. 1.

THOMAS SOVEREIGN GATES.

Philadelphia, February, 1895.